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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Nevada)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM EDWARD RODGERS,

Defendant and Appellant.

C040229

(Super. Ct. No. SF00395D)

Defendant William Edward Rodgers entered a plea of guilty to robbery (Pen. Code, § 211), and thereafter the trial court found true allegations that he was armed with a weapon (Pen. Code, § 12022, subd. (a)(1), hereafter section 12022(a)(1)) and that he had personally used a weapon in the commission of the robbery (former Pen. Code, § 12022.5, subd. (a)(1),¹ hereafter section 12022.5(a)(1)). Defendant contends the evidence was

¹ Penal Code section 12022.5, subdivision (a)(1) was amended after defendant's conviction. (Stats. 2002, ch. 126, § 3.) The amendment does not affect the issues raised on appeal.

insufficient to establish either enhancement. Since the record discloses otherwise, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and his accomplice, Douglas Edwards, perpetrated the robbery in order to obtain the medical marijuana of the victim, Anthony Silva. The robbery occurred at Silva's residence on Skyland Road in Nevada City on the evening of November 27, 2000. Upon returning home shortly before 9:00 p.m., Silva poured himself a glass of brandy and went outside to smoke. Silva noticed defendant and Edwards, who were both armed with guns, walking towards him. They ordered Silva to lie face down on the ground, and demanded to know where he kept his marijuana. When Silva told them he did not have any, they said they knew he had "a ton of it," and they threatened to kill him. Silva relented, and told them it was in a blue dome tent at the end of an adjacent pathway. Edwards walked to the tent, stopping first at Silva's truck to take some items. Defendant watched over Silva at gunpoint. Silva asked defendant if he could finish his brandy. Defendant agreed, and let Silva get up. Defendant asked Silva who was in the house, and Silva replied that his wife was. Edwards returned carrying a bag full of marijuana. He asked Silva why he was standing up, gave him a shove, and told him they were going in the house. Silva said "no, we're not," turned to defendant, and asked him whether defendant would shoot him for "that little bit of marijuana." Defendant swore at Silva, taunted him, and fired three shots in his direction. Edwards, who by that time was walking off the

property, spun around, fired three or four shots into the air, and said "come on, let's go" to defendant. Silva also heard additional shots in the distance. After hearing the other shots, defendant and Edwards fled. Silva returned to his residence and instructed his wife to dial 911, as well as his neighbors and relatives, to tell them of the robbery.

Defendant testified that he planned to purchase marijuana from Silva, and that he was unaware that Edwards was armed until he pulled out his gun. Defendant denied being armed, and claimed that Edwards alone fired the shots. Defendant testified that he, rather than Edwards, went to the tent to retrieve Silva's marijuana. Defendant also testified that while escaping in his vehicle he was run off the road by an unknown vehicle. When defendant alighted from his vehicle, one of the occupants of the other vehicle fired shots at him, with one bullet lodging in his leg.

Marilyn Brown, who lived in the vicinity of the crash, testified that she assisted defendant by handing him a wet rag, which he placed on his leg wound. She was not sure if defendant had used the rag to wipe off his hands.

Silva was called to the scene and identified defendant as one of his assailants. Defendant was then transported to a hospital, where a gun residue sample was taken from his hands. The sample tested negative for gunshot residue, although it was possible that no residue deposited on his hands or defendant may have wiped his hands clean before the test was administered. A

gun residue sample from Edwards proved positive for gunshot residue.

Over the course of the investigation and trial, Silva gave varying accounts of the weapons used in the robbery. Silva told investigators that defendant was armed with a .22 or .25-caliber handgun, while Edwards used a "nine millimeter" or a "380."

Some of Silva's stolen property was found in the vicinity of the Brown residence, where defendant was apprehended. The handgun defendant used was not recovered.

Defendant argued the enhancements were not proven due to Silva's inconsistent account of the weapons used, his alleged motive to fabricate because a friend or relative may have shot defendant, and the absence of gunshot residue on defendant's hands. Defendant argued that the presence of stolen property near the Brown residence proved that defendant was the person who retrieved the marijuana from the tent, while Edwards stood guard over Silva.

The prosecution responded that the inconsistencies in Silva's statements were minor; the gun residue test did not exonerate defendant because he could have wiped his hands clean with the wet rag at the Brown residence; and even if Silva were mistaken as to which assailant kept watch over him, the mistake was immaterial because Silva testified that each man was armed and had fired his weapon.

The court found true the allegation that defendant was armed and had personally used a weapon in the commission of the robbery, although it expressed some doubt whether defendant had

actually fired his weapon. The court stated: "After reviewing all of the evidence in this particular matter, it is the finding of the Court, and knowing that the standard of proof is beyond a reasonable doubt, it is the finding of the Court that the allegation that in the commission and attempted commission of the offense, [d]efendant personally used a firearm, is true. Certainly there is evidence going both ways on that subject, but since it is not what the District Attorney [is] charging him with, I don't have to make that finding actually officially, I'm just stating that in terms of how I view the enhancement I have found true, that's one of the circumstances the Court will certainly consider in setting a term for that at the time of sentencing, which I guess that's all that's left to do at that point."

At the sentencing hearing, the court reiterated its finding that "[w]hile I do have a doubt in my mind as to whether or not [defendant] discharged a firearm, I don't have a doubt in my mind, at least after hearing the evidence, that he had a weapon at the time that the robbery occurred."

The court sentenced defendant to a three year term for the robbery conviction. The court added the mitigated term of three years for the personal gun use enhancement. (§ 12022.5(a)(1).) The court did not impose any sentence for the armed enhancement under section 12022(a)(1)--a matter we shall discuss later in the opinion.

DISCUSSION

Sufficiency of the Evidence Supporting Enhancements

Defendant contends the evidence was insufficient to establish that he was "armed with a firearm in the commission or attempted commission of a felony" (§ 12022(a)(1)) or that he "personally use[d] a firearm in the commission or attempted commission of a felony" (§ 12022.5(a)(1)).² Before assessing these claims in detail, we set forth the well-settled standards of review.

"To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the

² Section 12022(a)(1) provides in relevant part that ". . . any person who is armed with a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless the arming is an element of the offense of which he or she was convicted."

Section 12022.5(a)(1) provides in relevant part that ". . . any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of the offense of which he or she was convicted."

crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

A defendant is "armed" within the meaning of section 12022(a)(1) "if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.] . . . '[A] firearm that is available for use as a weapon creates the very real danger it will be used.' [Citation.] Therefore, '[i]t is the availability--the ready access--of the weapon that constitutes arming.'" (*People v. Bland* (1995) 10 Cal.4th 991, 997.) "[A]rming under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body." (*Id.* at p. 997.)

A defendant "personally uses a firearm" within the meaning of section 12022.5(a)(1) if there is some nexus between the offense and the firearm, such that the firearm was an instrumentality of the crime. (*People v. Lerma* (1996) 42 Cal.App.4th 1221, 1226.) "'Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.'" [Citation.]'"

(*People v. Bland, supra*, 10 Cal.4th 991, 997, quoting *People v. Chambers* (1972) 7 Cal.3d 666, 672-673.) In sum, section 12022.5(a)(1) requires something more than mere arming but something less than actual discharge of a weapon.

Defendant concedes that Silva's testimony is sufficient to sustain the findings under sections 12022(a)(1) and 12022.5(a)(1), but insists that Silva's credibility was severely compromised by his inconsistent accounts of the weapons, his motive to fabricate, and the possibility that he was mistaken as to which assailant guarded him and which assailant retrieved the marijuana.

The difficulty with this argument is that it ignores that we are bound to accept the trial court's determination of Silva's credibility. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) By finding that defendant was armed and personally used a firearm in the commission of the robbery, the trial court implicitly relied on the testimony of Silva, who was the only witness who testified to these facts.

It is true the court stated it was not convinced beyond a reasonable doubt that defendant fired his weapon. In light of the conflicting evidence on this point, the court's statement was reasonable, although unnecessary to its decision on the enhancements. The court's comments do not, however, call into question all of Silva's testimony or the court's ultimate findings in relation thereto, particularly since the court later stated that it was certain that defendant was armed and had personally used his weapon. Moreover, the court's findings

withstand scrutiny whether defendant kept watch over Silva or retrieved the marijuana, since Silva testified that both men were armed and brandished their weapons.

"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352; accord *People v. Thornton* (1974) 11 Cal.3d 738, 754.)

Defendant's arguments regarding Silva's credibility do not show that his testimony was inherently improbable. They simply reiterate the factual arguments that were made to, and properly rejected by, the trial court.

Disposition of section 12022(a)(1) Enhancement

In the final sentence of his opening brief, defendant suggests the matter should be remanded for possible resentencing with respect to the section 12022(a)(1) enhancement. This

cryptic statement did not prompt a response from the People, whose brief is silent on the issue of the section 12022(a)(1) enhancement. In his reply brief, defendant proposes that the trial court made no finding with respect to the section 12022(a)(1) enhancement. He requests that the case be remanded to the trial court so that it can make a finding regarding this enhancement, and resentence defendant, if appropriate.

There is no need to remand the matter. Although far from explicit, the record reflects that the court was aware it was ruling on both the section 12022(a)(1) enhancement and the section 12022.5(a)(1) enhancement, and it found both had been proven. The clerk's minutes additionally recite that "[t]he Court finds the allegations of the armed enhancement to be true."³ The probation report does not mention the section 12022(a)(1) enhancement, however, and neither the reporter's transcript at sentencing nor the abstract of judgment discloses a disposition of the enhancement.

Penal Code section 1170.1, subdivision (f), and California Rules of Court, rule 4.447, dictate the resolution of this uncertainty.

³ Since the minutes refer to "enhancement" in the singular, it is not clear whether they reflect the court's finding with respect to the section 12022(a)(1) enhancement or the section 12022.5(a)(1) enhancement, or both. Any ambiguity on this point is cured, however, by the court's express finding of the section 12022.5(a)(1) enhancement, since every violation of 12022.5(a)(1) necessarily includes a violation of section 12022(a)(1). (Cf. *People v. Turner* (1983) 145 Cal.App.3d 658, 684, disapproved on another ground in *People v. Majors* (1998) 18 Cal.4th 385, 410-411; see fn. 1, *ante*.)

Penal Code section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

California Rules of Court, rule 4.447 provides: "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the overall aggregate term, such as limits on subordinate terms, or limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed."

In accordance with its finding that defendant violated section 12022(a)(1), the court should have imposed but then stayed execution of the one-year enhancement until defendant's service of the three year term on the robbery conviction and the three year enhancement under section 12022.5(a)(1). Rather than remand the matter, we will modify the judgment accordingly. (Pen. Code, § 1260.)

DISPOSITION

The trial court is directed to amend the abstract of judgment and the minutes of the sentencing hearing to reflect the fact that an armed principal allegation, under Penal Code section 12022, subdivision (a)(1), was found true as to defendant's robbery conviction, and to impose and then stay execution of this incorrectly-omitted enhancement. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy thereof to the Department of Corrections. As modified, the judgment is affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

RAYE, J.